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SENATE BILL 616

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

INTRODUCED BY

John Arthur Smith

AN ACT

RELATING TO MORTGAGE LOANS; AMENDING AND ENACTING CERTAIN  
SECTIONS OF THE MORTGAGE LOAN COMPANY AND LOAN BROKER ACT TO  
INCLUDE CONSUMER FINANCE COMPANIES, PROHIBIT CERTAIN PRACTICES  
AND PREEMPT REGULATION BY LOCAL GOVERNMENTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 58-21-6 NMSA 1978 (being Laws 1983,  
Chapter 86, Section 6, as amended by Laws 2001, Chapter 251,  
Section 5 and by Laws 2001, Chapter 264, Section 5) is amended  
to read:

"58-21-6. PERSONS EXEMPT FROM REGISTRATION. -- The  
following persons shall be exempt from all provisions of the  
Mortgage Loan Company and Loan Broker Act:

A. banks, trust companies, savings and loan  
associations, credit unions, [~~consumer finance companies~~]

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1 insurance companies or real estate investment trusts as defined  
2 in 26 USCA 856;

3 B. an attorney licensed to practice law in New  
4 Mexico who is not principally engaged in the business of  
5 negotiating loans secured by real or personal property, when  
6 the person renders services in the course of his practice as an  
7 attorney;

8 C. a New Mexico-licensed real estate broker  
9 rendering service in the performance of his duties as a real  
10 estate broker who obtains financing for a real estate  
11 transaction involving an actual bona fide sale of real estate  
12 or real estate contract handled by the broker and who receives  
13 only the customary real estate broker's commission in  
14 connection with the transaction;

15 D. a person doing an act under order of a court;

16 E. a person making or acquiring a mortgage loan  
17 with his own funds for his own investment without the intent to  
18 resell the mortgage loan;

19 F. the United States of America, state of New  
20 Mexico or any of their branches, agencies, departments, boards,  
21 instrumentalities or institutions and all political  
22 subdivisions of the state and their agencies, instrumentalities  
23 and institutions; and

24 G. a company licensed as a small business  
25 investment company under the federal Small Business Investment

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1 Act of 1958. "

2 Section 2. A new section of the Mortgage Loan Company and  
3 Loan Broker Act, Section 58-21-18.1 NMSA 1978, is enacted to  
4 read:

5 "58-21-18.1. [NEW MATERIAL] PROHIBITED ACTS--

6 DEFINITIONS. --

7 A. As used in Sections 58-21-18.1 through  
8 58-21-18.5 NMSA 1978:

9 (1) "annual percentage rate" means the annual  
10 percentage rate for a mortgage loan calculated according to the  
11 provisions of 15 USCA 1606;

12 (2) "borrower" means any natural person  
13 obligated to repay a high-cost home loan, including, but not  
14 limited to, a co-borrower, co-signor or guarantor;

15 (3) "bridge loan" means a loan with a maturity  
16 of less than eighteen months that only requires the payment of  
17 interest until the entire unpaid balance is due and payable;

18 (4) "high-cost home loan" means a mortgage  
19 loan in which:

20 (a) the annual percentage rate exceeds,  
21 by more than the allowable percentage points set by rule of the  
22 director, the yield on United States treasury securities having  
23 comparable periods of maturity on the fifteenth day of the  
24 month immediately preceding the month in which the application  
25 for the extension of credit is received by the mortgage loan

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1 company or loan broker; or

2 (b) the total points and fees payable by  
3 the borrower at or before closing exceed the greater of: 1)  
4 eight percent of the total loan amount; or 2) a dollar amount  
5 set by rule of the director; and

6 (5) "total points and fees" means:

7 (a) all items included in the finance  
8 charge, except interest or the time-price differential;

9 (b) all compensation paid to loan  
10 brokers; and

11 (c) all other charges paid at closing  
12 unless: 1) the charge is reasonable; 2) the mortgage loan  
13 company or loan broker receives no direct or indirect benefit;  
14 and 3) the charge is paid to a third party that is unaffiliated  
15 with the mortgage loan company or loan broker.

16 B. No mortgage loan company or loan broker:

17 (1) shall make or arrange a high-cost home  
18 loan that provides for a higher interest rate after default on  
19 the loan; provided, however, that this prohibition does not  
20 apply to interest rate changes in a variable rate loan  
21 otherwise consistent with the provisions of the loan documents  
22 if the change in interest rate is not triggered by a default or  
23 the acceleration of the interest rate;

24 (2) shall make or arrange a high-cost home  
25 loan that has a term of less than ten years that contains terms

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1 under which the aggregate amount of the regular periodic  
2 payments would not fully amortize the outstanding principal  
3 balance; provided, however, this prohibition does not apply  
4 when the payment schedule is adjusted to account for the  
5 seasonal or irregular income of the borrower or if the loan is  
6 a bridge loan;

7 (3) shall make or arrange a high-cost home  
8 loan that contains terms under which the outstanding principal  
9 balance will increase at any time over the course of the loan  
10 because the regular periodic payments do not cover the full  
11 amount of the interest due;

12 (4) shall make or arrange a high-cost home  
13 loan that includes terms under which more than two periodic  
14 payments required under the loan are consolidated and paid in  
15 advance from the loan proceeds provided to the borrower;

16 (5) shall engage in any pattern or practice of  
17 extending high-cost home loans to borrowers based upon the  
18 borrowers' collateral without regard to the borrowers' ability  
19 to repay the loan, including the borrowers' current and  
20 expected income, current obligations and employment;

21 (6) shall make payments to a contractor under  
22 a home improvement contract from amounts of a high-cost home  
23 loan other than:

24 (a) in the form of an instrument that is  
25 payable to the borrower or jointly to the borrower and the

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1 contractor; or

2 (b) at the election of the borrower by a  
3 third-party escrow agent in accordance with terms established  
4 in a written agreement signed by the borrower, the lender and  
5 the contractor prior to the date of payment;

6 (7) shall make or arrange a high-cost home  
7 loan that contains a provision that permits the lender in its  
8 sole discretion to call or accelerate the indebtedness;  
9 provided, however, that this provision does not prohibit  
10 acceleration of the loan due to the borrower's failure to abide  
11 by the terms of the loan, or due to fraud or material  
12 misrepresentation by the consumer in connection with the loan;

13 (8) or an affiliate or assignee of a mortgage  
14 loan company or loan broker shall refinance any high-cost home  
15 loan to the same borrower when the refinancing does not have a  
16 reasonable benefit to the borrower considering all of the  
17 circumstances, including the terms of both the new and  
18 refinanced loans, the cost of the new loan and the borrower's  
19 circumstances;

20 (9) shall engage in acts or practices to evade  
21 the requirements of this section, including a pattern or  
22 practice of arranging for the refinancing of the lender's or  
23 assignee's own loans by affiliated or unaffiliated lenders or  
24 modifying a loan agreement, whether or not the existing loan is  
25 satisfied and replaced by the new loan, and charging a fee;

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1 (10) shall recommend or encourage default on  
2 an existing loan or other debt prior to and in connection with  
3 the closing or planned closing of a high-cost home loan that  
4 refinances all or any portion of such existing loan or debt;

5 (11) make or arrange a high-cost home loan  
6 that is a direct result of a potential or future lender or its  
7 representative offering or selling a high-cost home loan at the  
8 residence of a potential borrower without a prearranged  
9 appointment with the potential borrower or the expressed  
10 invitation of the potential borrower. This prohibition shall  
11 not apply to mail solicitations that may be received by the  
12 potential borrower;

13 (12) shall make or arrange a high-cost home  
14 loan that includes provisions for charging a late payment fee  
15 except as provided in this paragraph. A late payment fee shall  
16 not be in excess of five percent of the amount of the payment  
17 past due. A late payment fee shall only be assessed for a  
18 payment past due for fifteen days or more. A late payment fee  
19 may not be charged more than once with respect to a single late  
20 payment. If a late payment fee is deducted from a payment made  
21 on the loan and the deduction causes a subsequent default on a  
22 subsequent payment, a late payment fee may not be imposed for  
23 the default. If a late payment fee has been imposed once with  
24 respect to a particular late payment, no such fee shall be  
25 imposed with respect to any future payment that would have been

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1 timely and sufficient but for the previous default; and

2 (13) shall charge a borrower any fees or other  
3 charges to modify, refinance, extend or amend a high-cost home  
4 loan or to defer any payment due under the terms of a high-cost  
5 home loan on a minimum of one modification, renewal, extension,  
6 or deferral per each twelve months of the length of the loan. "

7 Section 3. A new section of the Mortgage Loan Company and  
8 Loan Broker Act, Section 58-21-18.2 NMSA 1978, is enacted to  
9 read:

10 "58-21-18.2. [NEW MATERIAL] DISCLOSURE. -- A mortgage loan  
11 company or loan broker shall not make or arrange a high-cost  
12 home loan unless the company or the broker has provided the  
13 following notice in writing to the borrower not less than three  
14 business days prior to the closing of the loan:

15 "Consumer Caution and Home Loan Ownership Counseling Notice

16 If you obtain this loan, which pursuant to New  
17 Mexico state law is a high-cost home loan, the  
18 lender will have a mortgage on your home. You could  
19 lose your home, and any money you have put into it,  
20 if you do not meet your obligations under the loan.

21 You should shop around and compare loan rates  
22 and fees. Mortgage loan rates and closing costs and  
23 fees vary based on many factors, including your  
24 particular credit and financial circumstances, your  
25 earnings history, the loan-to-value requested and

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1 the type of property that will secure your loan.  
2 The loan rate and fees could vary based on which  
3 lender or mortgage broker you select. Higher rates  
4 and fees may be related to the individual  
5 circumstances of a particular consumer's  
6 application.

7 You should consider consulting a credit  
8 counselor or other experienced financial adviser  
9 regarding the rate, fees and provisions of this  
10 mortgage loan before you proceed.

11 You are not required to complete any loan  
12 agreement merely because you have received these  
13 disclosures or have signed a loan application. If  
14 you proceed with this mortgage loan, you should also  
15 remember that you may face serious financial risks  
16 if you use this loan to pay off credit card debts  
17 and other debts in connection with this transaction  
18 and then subsequently incur significant new credit  
19 card charges or other debts.

20 Property taxes and homeowner's insurance are  
21 your responsibility. Not all lenders provide escrow  
22 services for these payments. You should ask your  
23 lender about these services.

24 Your payments on existing debts contribute to  
25 your credit ratings. You should not accept any

1           advice to ignore your regular payments to your  
2           existing creditors. Accordingly, it is important  
3           that you make regular payments to your existing  
4           creditors. ". "

5           Section 4. A new section of the Mortgage Loan Company and  
6           Loan Broker Act, Section 58-21-18.3 NMSA 1978, is enacted to  
7           read:

8           "58-21-18.3. [NEW MATERIAL] ADDITIONAL POWERS AND DUTIES  
9           OF DIVISION. --

10           A. The division shall promulgate such rules as are  
11           necessary to carry out the provisions of Sections 58-21-18.1  
12           and 58-21-18.2 NMSA 1978, including, after considering similar  
13           rules of the board of governors of the federal reserve system,  
14           the allowable percentage points pursuant to Subparagraph (a) of  
15           Paragraph (4) of Subsection A of Section 58-21-18.1 NMSA 1978  
16           and the dollar amount allowed by Subparagraph (b) of that  
17           paragraph.

18           B. The division may conduct an investigation of any  
19           person whenever the division has reason to believe, upon  
20           complaint or otherwise, that a violation of Section 58-21-18.1  
21           or 58-21-18.2 NMSA 1978 has occurred.

22           C. Any person having reason to believe that a  
23           provision of Section 58-21-18.1 or 58-21-18.2 NMSA 1978 has  
24           been violated may file a written complaint with the division  
25           setting forth the details of the alleged violation.

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1           D. The division may bring action against a person  
2 who has violated a provision of Section 58-21-18.1 or  
3 58-21-18.2 NMSA 1978 to enjoin the person from continuing in or  
4 engaging in any act in furtherance of the violation.

5           E. In an injunctive proceeding, the district court  
6 of Santa Fe county may, on due showing by the division, issue a  
7 subpoena or subpoena duces tecum requiring the attendance of  
8 any witness and requiring the production of any books,  
9 accounts, records or other documents and materials that appear  
10 necessary to the expeditious resolution of the application for  
11 injunction.

12           F. The division may issue and serve upon any person  
13 an order to cease and desist and to take corrective action  
14 whenever the division has reason to believe the person is  
15 violating or has violated Section 58-21-18.1 or 58-21-18.2 NMSA  
16 1978.

17           G. Whenever the division finds a person in  
18 violation of Section 58-21-18.1 or 58-21-18.2 NMSA 1978, it may  
19 enter an order imposing a fine in an amount not exceeding one  
20 thousand dollars (\$1,000) for each separate offense, provided  
21 that the aggregate fine for all violations of those sections  
22 that could have been asserted at the time of the order imposing  
23 the fine shall not exceed one hundred thousand dollars  
24 (\$100,000). "

25           Section 5. A new section of the Mortgage Loan Company and  
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1 Loan Broker Act, Section 58-21-18.4 NMSA 1978, is enacted to  
2 read:

3 "58-21-18.4. [NEW MATERIAL] ENFORCEMENT. --

4 A. Any person committing a material violation of  
5 Section 58-21-18.1 or 58-21-18.2 NMSA 1978 shall forfeit the  
6 interest charged on the high-cost home loan or contracted to be  
7 charged or received, and only the principal sum of the high-  
8 cost home loan may be enforced in a court in this state.

9 B. A mortgage loan company or loan broker making or  
10 arranging a high-cost home loan who, when acting in good faith,  
11 fails to comply with Section 58-21-18.1 or 58-21-18.2 NMSA 1978  
12 shall not be deemed to have violated those sections if the  
13 mortgage loan company or loan broker establishes that within  
14 sixty days after receiving a notice from the borrower or  
15 division of the compliance failure, that noncompliance was not  
16 intentional and resulted from a bona fide error. The mortgage  
17 loan company or loan broker shall have thirty days to make an  
18 appropriate restitution to the borrower, and appropriate  
19 adjustments to the loan. Bona fide errors include clerical,  
20 calculation, computer malfunction and programming, and printing  
21 errors."

22 Section 6. A new section of the Mortgage Loan Company and  
23 Loan Broker Act, Section 58-21-18.5 NMSA 1978, is enacted to  
24 read:

25 "58-21-18.5. [NEW MATERIAL] PREEMPTION. --

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1           A. Counties and municipalities, including home rule  
2 counties and municipalities, are prohibited from enacting and  
3 enforcing ordinances and rules regulating financial or lending  
4 activities, including ordinances, resolutions and rules  
5 disqualifying mortgage loan companies or loan brokers from  
6 doing business with a county or municipality based upon lending  
7 interest rates or imposing reporting requirements or any other  
8 obligations upon lenders regarding financial services or  
9 lending practices of persons or entities, and any subsidiaries  
10 or affiliates thereof, who:

11                   (1) are subject to the provisions of Sections  
12 58-21-18.1 and 58-21-18.2 NMSA 1978 or otherwise subject to the  
13 jurisdiction of the division pursuant to the Mortgage Loan  
14 Company and Loan Broker Act;

15                   (2) are subject to the jurisdiction of the  
16 federal office of thrift supervision, the federal office of the  
17 comptroller of the currency, the national credit union  
18 administration, the federal deposit insurance corporation, the  
19 federal trade commission or the United States department of  
20 housing and urban development;

21                   (3) originate, purchase, sell, assign, secure  
22 or service property interests or obligations created by  
23 financial transactions or loans made, executed or originated by  
24 persons provided for in Paragraphs (1) or (2) of this  
25 subsection to assist or facilitate such transactions; or

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(4) are chartered by the United States  
congress to engage in secondary market mortgage transactions.

B. Nothing in this section prohibits a county or  
municipality from disqualifying a lender from doing business  
with a county or municipality if there is proof of  
noncompliance with Section 58-21-18.1 or 58-21-18.2 NMSA 1978. "

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